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PATENT
Docket No. P1230

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

APPELLANT: NOEL LEE

SERIAL NO.: 09/735,697 EXAMINER: DEBERADINIS, ROBERT

FILED: DECEMBER 12, 2000 ART UNIT: 2836

FOR: APPARATUS AND METHOD FOR POWERING MULTIPLE
PERIPHERAL DEVICES FROM A COLOR-CODED CENTRAL POWER
SOURCE

**MAIL STOP APPEAL BRIEF-PATENTS
COMMISSIONER FOR PATENTS
P.O. BOX 1450
ALEXANDRIA, VA 22313-1450**

TRANSMITTAL LETTER

Dear Sir:

In connection with the above-referenced patent application, transmitted herewith are the following:

1. Corrected Appeal Brief in triplicate (52 pages);
2. Post card in acknowledgment of receipt of all transmitted materials.

Please date-stamp the enclosed post card and return to the undersigned in acknowledgment of receipt of all transmitted materials.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'DL', with a long horizontal stroke extending to the right.

F/ David LaRiviere
Reg. No. 27,207

FDL/taa
March 9, 2006
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**CORRECTED APPEAL BRIEF
UNDER 35 U.S.C. § 143(a), 37 C.F.R. § 1.192, and 37 C.F.R. § 1.193(b)(2)**

To the Commissioner:

This is a Corrected Appeal Brief arising from the Final Office Action mailed June 14, 2005. Notice of Appeal and a Petition for a Two (2) Month Extension of time were timely filed October 17, 2005 with the requisite fee. The fee payment of five hundred dollars (\$500) was submitted with the previously filed Appeal Brief.

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I. REAL PARTY IN INTEREST

The real party in interest is the assignee of the patent application, Monster Cable Products, Inc., doing business at 455 Valley Drive, Brisbane, California 94005-1209.

II. RELATED APPEALS AND INTERFERENCES

On information and belief, no related appeals or interferences are pending.

III. STATUS OF CLAIMS

This continuation application (US 09/735,697), claiming priority to US 60/070,317 via US 09/735,697, was filed with Claims 8-9, 11-12, 14-15, 17-18, 20, 23, and 26. A Preliminary Amendment, canceling Claims 8-9, 11-12, 14-15, 17-18, 20, 23, and 26 and adding Claims 29-40, was also therewith filed. Subsequently, the then-Examiner, Sharon Polk, issued a final Office Action on August 28, 2001, maintaining her objection of Claims 37, 39, and 40, under 37 C.F.R. § 1.75(c), and her rejection of Claims 29-40, under 35 U.S.C. § 112, 35 U.S.C. § 102(b) and 35 U.S.C. § 103(a). A Response to the August 28, 2001, final Office Action was filed on October 5, 2001.

Examiner Sharon Polk then reopened prosecution and issued a second final Office Action on November 5, 2001, wherein she withdrew her grounds for objection of the claims on the basis of 37 C.F.R. § 1.75(c), as well as her grounds for rejection of the claims on the bases of 35 U.S.C. § 112 and 35 U.S.C. § 102(b), but maintained her rejection of Claims 29-40 under 35 U.S.C. § 103(a). A Notice of Appeal was filed December 11, 2001, for Claims 29-40 and an Appeal Brief was filed February 8, 2002.

Subsequently, Examiner Sharon Polk reopened prosecution for a second time via a Telephonic Action on April 8, 2002. Thereafter, she issued a non-final Office Action on May 6, 2002, wherein Claims 29-40 were rejected. However, she implicitly withdrew the previously cited references, Dwight (i.e., Kensington) (US Des. 401,220) and Barna (US 5,775,935), as grounds for rejection of the claims on the basis of 35 U.S.C. § 103(a). She then maintained her rejection of Claims 29-40 relying only on Lee (US 5,589,718) in view of Sunabe (US 5,366,250) under 35 U.S.C. § 103(a).

An In-Person Interview was conducted on May 22, 2002, by the Applicant's Attorney, Mr. F. David LaRiviere, with Examiner Sharon Polk and her Supervisory Patent Examiner Brian Sircus, during which Supervisory Patent Examiner Brian Sircus suggested that the Applicant amend the claims to positively recite that "the relationship between color and alpha [i.e., the peripheral device] can be changed" as shown in the Interview Summary of the same date. A Response to the May 6, 2002 Office Action was on filed September 5, 2002, wherein Claims 29-40 were canceled, without prejudice, and Claims 41-48 were added which positively recited that "the relationship between color and alpha [i.e., the peripheral device] can be changed" as suggested by the Supervisory Patent Examiner. The case was then referred to "Sensitive Applications Division" of the USPTO, according to the Supervisory Patent Examiner in a telephone conference on December 29, 2002. The case was referred back to Examiner Sharon Polk who issued yet another final Office Action on January 16, 2003.

An Amendment After Final Rejection was submitted on March 13, 2003. A Telephonic Interview was conducted on April 9, 2003 during which Examiner Polk indicated that she was unable to locate the March 13, 2003 Response, as well as the PTO file. The Applicant's Attorney advised her that the return acknowledgment postcard had been received from the PTO for the March 13, 2003, Response. A copy of the March 13, 2003 Response was subsequently transmitted by facsimile to Examiner Polk on the same day.

No further action by Examiner Polk was received by Applicant's Attorney. Therefore, a Request for Reinstatement of the Appeal was filed on May 13, 2003. By August 19, 2003, no further action by the USPTO nor by the Board of Patent Appeals and Interferences prompted a telephone call to Examiner Polk by the Applicant's Attorney. Examiner Polk returned the telephone call on August 21, 2003, and indicated that she was "working on it." However, the Applicant's Attorney was unable to determine whether "working on it" meant a reopening of prosecution or the preparation of an Examiner's Answer under the Appeal. With yet no further action on the case by October 2003, the Applicant's Attorney filed a Status Inquiry Letter in the USPTO on October 1, 2003, and telephoned the Supervisory Patent Examiner Brian Sircus on November 6, 2003, seeking some indication of the present application's status. Supervisory Patent Examiner Brian Sircus returned that call on November 12, 2003, to report that Examiner Polk intended to reopen

prosecution once more and that she would be contacting us telephonically. As no telephonic communication from Examiner Polk was received, the Applicant's Attorney placed another telephone call to Supervisory Patent Examiner Brian Sircus on November 14, 2003, during which he advised the Applicant's Attorney that Examiner Polk was not in the office for several days and that she would contact the Applicant's Attorney on November 17, 2003. Again, no communication was received from Examiner Polk as anticipated. The Applicant's Attorney made yet another telephone call to the Supervisory Patent Examiner on November 18, 2003.

Examiner Polk never called the Applicant's Attorney. Instead, she reopened prosecution and issued an Office Action on November 28, 2003, which was received by the Applicant's Attorney on December 1, 2003. The Applicant's Attorney found it necessary to call the Supervisory Patent Examiner on December 2, 2003, to request a copy of a missing non-patent reference cited in Examiner Polk's November 28, 2003, Office Action.

In a telephone conference with the Supervisory Patent Examiner on December 3, 2003, the Applicant's Attorney was advised that Primary Examiner Greg Toatley would assume responsibility for the case as Examiner Polk would no longer be in the employ of the USPTO. A Telephonic Interview was conducted on January 27, 2004, followed by an informal Response to Office Action filed on January 30, 2004. A second Telephonic Interview was conducted on February 4, 2004, with Primary Examiner Toatley, during which amendment to the claims was proposed. A formal Response to Office Action was filed on March 26, 2004, including an amendment to the claims consistent with those proposed during the February 4, 2004, Telephonic Interview. In that amendment, Claims 41-48 were canceled, without prejudice, and Claims 49-62 were added. On April 15, 2004, the Applicant's Attorney made a telephone call to the Primary Examiner to verify receipt of the March 26, 2004, Response to Office Action and to confirm receipt of the Acknowledgment Postcard on April 2, 2004. Primary Examiner Toatley stated that he had not received the Response and requested a fax copy of it. An In-Person Interview was conducted with the Primary Examiner on May 10, 2004, by Mr. F. David LaRiviere; and a corresponding Interview Summary was issued on May 12, 2004. On June 22, 2004, the Applicant's Attorney called Examiner Toatley regarding the March 26, 2004, Response to Office Action, during which Examiner Toatley reported that he had been promoted and that yet another examiner, Primary Examiner Robert

DeBeradinis, would assume responsibility for the case.

By September 2004, as no further action was rendered by the USPTO on the case, the Applicant's Attorney telephoned the new examiner, Examiner DeBeradinis, on September 1, 2004. Telephonic Interviews were conducted on September 2, 2004, and September 7, 2004, during which further amendment to the claims was proposed in the belief, once again, that such amendment would place the application in condition for allowance. A Supplemental Amendment Response to Office Action was filed on September 22, 2004, wherein Claims 49, 56, and 58-61 were not substantially amended. Another Telephonic Interview was conducted on October 21, 2004, during which Examiner DeBeradinis indicated allowability of the claims. A telephone conference was conducted with Examiner DeBeradinis on October 28, 2004, during which Examiner DeBeradinis indicated that a Notice of Allowance would issue. On November 3, 2004, another telephone conference was held with Examiner DeBeradinis, during which he indicated that the Supplemental Amendment required further revision only as to informalities which is also shown in the October 28, 2004, Notice of Non-Compliant Amendment. On November 12, 2004, a Revised Supplemental Amendment Response to Office Action was filed in compliance with the October 28, 2004, Notice of Non-Compliant Amendment.

Having neither received a Notice of Allowance nor a Notice of Allowability by January 2005, the Applicant's Attorney consulted the USPTO online PAIR System on January 24, 2005. The PTO electronic record indicated that a Notice of Allowability had indeed issued on November 15, 2004, but was never received by the Applicant's Attorney (See Evidence Appendix Exhibit A).

However, on January 25, 2005, the electronic record of the November 15, 2004, Notice of Allowability was deleted from the USPTO PAIR System (See Evidence Appendix Exhibit B). Instead, on January 31, 2005, the Applicant's Attorney received yet another Office Action dated January 25, 2005, wherein Claims 49-62 were rejected, citing a primary reference, Dwight (i.e., Kensington) (US Des. 401,220) and a secondary reference Barna (US 5,775,935), as grounds for rejection of the claims on the basis of 35 U.S.C. § 103(a). Both of these references were previously cited and withdrawn by Examiner Polk in the May 6, 2002, non-final Office Action, over three (3) years ago.

A Telephonic Interview was conducted on February 9, 2005, by Mr. F. David LaRiviere for

the purpose of pointing-out to Examiner DeBeradinis that both Dwight and Barna had already been previously cited and withdrawn by Examiner Polk, to which Examiner DeBeradinis replied that he was unaware of that part in the file history. He further stated that he had decided to conduct an independent search of the prior art, without acknowledging the previous allowability of the claims, which resulted in Dwight and Barna being reasserted in the outstanding Office Action. In that Telephonic Interview, Examiner DeBeradinis also agreed to reconsider the application in light of the Response of March 13, 2005 and in light of the file history. The Final Rejection was mailed June 14, 2005. A subsequent Telephonic Interview with Examiner DeBeradinis was conducted by Patent Attorney Don R. Mollick on July 26, 2005 at which time claim amendments under 37 § CFR 116 were suggested and rejected. Examiner DeBeradinis stated that the present application could not possibly be allowed without another appeal since according to the Examiner allowing the application would give Applicant an “unfair advantage over its competitors.” It is noteworthy that Applicants competitors released similar products in response to Applicant’s products which use the claimed invention. The time for response was extended and notice of appeal filed October 17, 2005. This Corrected Appeal Brief is hereby submitted to replace the Appeal Brief submitted in a timely fashion on December 19, 2005.

IV. STATUS OF AMENDMENTS

No Amendment After Final Rejection nor Amendment After Second Final Rejection has been submitted. The Applicant believes that independent Claims 49 and 58, as filed, fully encompasses all of the inventive features as set forth in the Specification and are allowable.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 49 addresses an AC electrical power distribution system with a plurality of substantially identical AC power distribution outlets for connecting AC electrical power to a plurality of devices, where the housing also has a plurality of colored areas (each colored area different from the other) for selectively identifying each respective outlet. The subject matter of independent claim 49 is found at, page 3 of the specification lines 12 through 24 and pages 5 line 23-page 6 line 16 and figure 2 and 3 of the drawings numbers 20N and 23 (a, b, c, d, e,...n).

Independent claim 58 describes a method for preventing confusion in users of a multiple outlet power strip having several identical outlets for providing power to a plurality of devices, comprising the steps of: assigning a separate and distinct colored area proximate to each outlet for selectively identifying each outlet of said power strip, assigning each colored area a different color from any other such colored area; and providing colored indicia corresponding to the colors of said colored areas for identifying devices assigned to each colored area. The subject matter of independent claim 58 is found at page 3 line 29 through page 4 line 6 of the specification and figures 1-8 of the drawings.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 49, 52, 56-62 are rejected, under 35 U.S.C. § 103(a), over Dwight (US Des. 401,220), in view of Barna (US 5,775,935).

Claims 50, 51, 54, and 55 are rejected, under 35 U.S.C. § 103(a), over Dwight (US Des. 401,220), in view of Barna (US 5,775,935), and in further view of Liner (US 5,708,554).

Claim 53 is rejected under 35 U.S.C. § 103(a), under Dwight (US Des. 401,220), in view of Barna (US 5,775,935), and in further view of Crane (US 5,899,761).

VII. ARGUMENT

INTRODUCTORY REMARKS

The Applicant notes that the Examiner, by conducting his own independent prior art search and applying his findings in the outstanding Office Action, has abandoned the previous grounds for objection to the claims, under 35 U.S.C. § 112 and 37 C.F.R. § 1.75 as well as the previous grounds for rejection of the claims, under 35 U.S.C. § 102(e), citing Friesen (US 6,496,884), under 35 U.S.C. § 103(a), citing Friesen (US 6,496,884), in view of Brooks (webpage entitled "How to Relabel or Rearrange Keycaps"), and under 35 U.S.C. § 103(a), citing Lee (US 5,589,718), in view of Friesen (US 6,496,884), and in further view of Brooks (webpage entitled "How to Relabel or Rearrange Keycaps"). Claims 49-62 were amended on November 12, 2004, in the Revised Supplemental Response to Office Action, based on the understanding that they were to be allowed thereafter, notwithstanding the Applicant's continuing belief that the claims would have been allowable as

originally filed.

The claims have not been substantially amended since the time of the May 6, 2002, non-final Office Action. Accordingly, the Applicant respectfully asserts that no claims have been narrowed within the meaning of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* (Fed.Cir. November 29, 2000).

The Examiner admitted the Declarations of the Applicant Noel Lee and of Retailer Karen Johnson on commercial success but, did not consider them to be persuasive due to a claimed lack of a nexus between the claimed invention and commercial success. The Declaration of the Applicant Noel Lee was also discounted due to a claimed lack of diligence between date of conception and reduction to practice. Applicant respectfully suggest that this is an impermissible shifting of the burden of proof and that these topics are asserted in the Declarations.

Claims 49-62 are believed to be fully supported by the specification, and are believed to be in allowable form. Alternatively, the claims are believed to be in form for appeal. Thus, favorable consideration of the present continuation application is respectfully requested in light of these remarks.

With the many possible combinations/permutations of electronic components (e.g., TV, VCR, DVD, etc.) available today, the consumer usually finds himself in a “confusing tangled mess” with respect to handling and managing all the cords emanating from them. Such is the problem with prior art “plain” plug strips, which provide no identifying information at all, where the average consumer needed superior memory to recall the electrical connections which were made long ago or superior vision to see those connections from any notable distance made between the plug strip and the equipment being plugged. Further, prior art means for tagging of electronic equipment were easily worn or dislodged. See Appendix B for an illustration of the prior art plug strip problems.

Imagine a typical user confronted with the scenario as follows: the power strip is under a bed, desk or behind an entertainment center under dim or no lighting conditions. Plugged into the power strip is a computer CPU, game console, stereo amplifier/receiver, tape deck, DVD player, CD player, turntable, powered speaker system, subwoofer, iPod charger/dock, VCR player, projection monitor, printer, cable modem, network hub/firewall, wireless router, scanner, wireless keyboard mouse power cord and a desk lamp. The modem is experiencing buffer overflow and needs to be

disconnected and restarted but has no on/off switch. The consumer is aware that if the CPU is disconnected there is a chance of destroying the hard disk drive with data loss as well as loss of an expensive component. Similarly, if the projection monitor is unplugged without going through a proper shutdown protocol there is a distinct possibility of destroying the projection bulb which costs \$400. The options are shutting down the whole system according to the proper procedures or guessing which plug to pull and taking your chances with large consequences at risk. The internal monologue when deciding which plug to pull is often to the level of "Do you feel lucky? Well do you?" This problem faces millions of consumers at least monthly.

Solving these prior art problems, the claimed invention is basically a solid color-coded plug strip for supplying power to many pieces of electronic equipment, such as one would require in a home computer system (e.g., computer, printer, scanner, modem, etc.), a home theater system (e.g., TV, VCR, DVD, etc.), a home sound system CD, receiver, LP turntable, cassette player, P/A systems, electronic musical instruments, etc.), and a home security system (e.g., alarm system, surveillance equipment such as closed circuit television, CCTV, infrared sensor such as IR camera, motion detector, electronic gate motor, intercom, etc.). The solid color coding of the present invention comprises solid colored areas on and surrounding each outlet. The claimed color coding, takes into consideration the human factors engineering principles and practical problems involved in setting-up and maintaining any of the foregoing electronic home systems for the typical consumer who may not have a background in electrical engineering. The solid color coding on the plug strip is substantially more prominent to the human eye than the cited art colored rings or stripes. The solid colors on the plug strip allow the consumer to easily see the connection, even from a distance without having to remember, squint, or predict that connection. See Appendix B for an illustration of the present solid color coded plug strip solution to the prior art problems.

The outlet areas of a prior art plain plug strip may be retrofitted by solid colored stickers comprising a retrofitting kit according to the present invention. Thus, the solid colored areas of the present invention plug strip may have their colors changed to suit the consumer by likewise retrofitting the strip with the solid colored stickers. Therefore, the present invention provides nearly unlimited flexibility by allowing the consumer to customize his electronic "hook-ups" without "hang-ups." Since the color-coding is applied to a plug strip rather than to a specialized electronic

apparatus, the user may connect any peripheral device to any outlet with any interconnect that he so chooses. In this way, the present invention allows the consumer to define desired color coding by applying optional color coding stickers.

The optional easy-to-use color coding retrofitting kit according to the present invention may include color coded cords, color coded stickers, and color coded indicia which allows the consumer to retrofit a prior art plain plug strip or to reassign the colors of the claimed solid color coded plug strip as he/she so desires. The color coded stickers and the color coded indicia may be adhered to plain prior art cords and to the electronic component. The color coded indicia have information (e.g., symbols, numbers, words, or acronyms) printed thereon about many types of consumer electronic equipment, enabling the consumer to easily further identify his electronic connection and the particular electronic component.

The present invention, as defined in the claims, is illustrated in Figures 2 and 3 of the Drawings and is described in the Detailed Description of the Invention beginning on page 6, line 27 of the continuation application. In one embodiment of the invention, the AC power distribution apparatus comprises: a solid color coded power strip apparatus 20N; a plurality of color coded power cords 35, 45, 55, (2) 45x, and 55x; and a plurality of color coded indicia elements I_{cx} . The power strip apparatus also comprises a housing with a plurality of AC outlet portions C1, C2, C3, C4, C5, ..., CX corresponding to outlet receptacles 23 (a, b, c, d, e, ..., n) for providing AC power to the same plurality of peripheral electrical devices. Each AC outlet housing portion is colored with a first color that is different from another AC outlet housing portion. The plurality of power cords comprise a power cord colored to match said first color. The remaining power cords of the plurality of power cords, comprise power cords colored to match each of the other colors on the power strip 20N. The indicia elements are, by example, an adhesive-backing type label having a color that matches the color of the power cord and the corresponding color of the AC outlet housing portion. The indicia elements I_{cx} also comprise identifying information (e.g., words, acronyms, numerals, and symbols) about the peripheral device to be powered.

Another embodiment of the present invention comprises a retrofitting kit. This kit comprises a plurality of indicia element sets for labeling a respective power strip AC outlet portion CX, power cord terminals, and the peripheral device to which AC power is desired to be distributed as well as

stickers for retrofitting the portions CX. The kit is also then useful in retro-fitting an after-market AC power strip product.

The presently claimed method consists of the steps of providing the color coded power strip, the color coded power cords, and the color coded indicia elements with identification of the peripheral device 30 and systematically assigning a color to a particular peripheral device 30 to which that particular color is to be associated, and then attaching the color coded power cable to the corresponding AC outlet portion CX on the AC power strip 20N. Alternatively, the present method may be that of providing the kit with indicia elements I_{cx} and assigning a particular color to a peripheral device 30, then applying the indicia element I_{cx} to the power strip AC outlet portion CX, the power cord terminal ends (e.g., 55a, 55b) and to the particular peripheral device 30.

Claims 49, 52, 56-62 are rejected under 35 U.S.C. § 103(a), over Dwight (US Des. 401,220), in view of Barna (US 5,775,935).

A. Specific nature of the rejection.

Claims 49, 52, 56-62 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Dwight (US Des. 401,220), in view of Barna (US 5,775,935). The subject matter of Dwight, the primary reference, has been previously cited as a product review article by Leonard Wiener, entitled “SmarterStrip,” U.S. News & World Report, published May 5, 1997, and as an anonymous article, entitled “Designer Surge Protectors Debut from Kensington,” *Twice*, published April 7, 1997, which discloses “... color coded sockets and matching identification rings to be placed on the electrical device that is plugged into it.” [Emphasis added.] (November 5, 2001, Office Action, para. 9). By the Examiner’s own cited art, Dwight, or the colored “labels” of the Wiener article have been further described as colored rings by the “Twice” article. Both Wiener and Twice teach the same subject matter of Dwight.

That Dwight has been previously cited and withdrawn may be understandably unclear to the current Examiner, given the long file history. Indeed, the “Twice” article even includes a photograph showing the same “colored rings” around each outlet. Further, the Assignee in Dwight, i.e., ACCO Brands, Inc., as apparent from the face of the patent, is the parent company of Kensington Technology Group which manufactures and markets the Kensington product (See

Exhibit C). Barna, the secondary reference, merely teaches a credit card terminal with a patterned colored template over non-identical ports and has been also previously cited as reflected the record.

A review of the record will show that Examiner Polk withdrew the antecedent references, Dwight and Barna, in her Office Action dated May 6, 2002. Thus, these references have already been considered with respect to the currently pending claims, which are substantially the same as those reviewed.

B. Analysis of the patentable distinctions between the present invention and Dwight (US Des. 401,220), i.e., the Kensington reference (i.e., the article by Leonard Wiener, entitled "SmarterStrip," U.S. News & World Report, published May 5, 1997), even in view of Barna (US 5,775,935), in light of the evidence.

1. Relevant case law with respect to application of 35 U.S.C. § 103(a).

A long line of cases circumscribe this type of §103(a) rejection. *In re Jones* (1992), further defines the rule of *In re Fine* (1988):

Before the PTO may combine the disclosures of two or more prior art references in order to establish prima facie obviousness, there must be some suggestion for doing so *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598-99 (Fed. Cir. 1988). [at 1943]

... the combination ... is not an extraordinary invention; it is deceptively simple. However, simplicity alone cannot be determinative of obviousness. See *Gentry Galley, Inc. v. Berkline Corp.*, 143 F.3d 1473, 1478 [45 USPQ2d 1498] (Fed. Cir. 1998); See also *In re Oetiker*, 977 F.2d 1443, 1447 [24 USPQ2d 1443] (Fed. Cir. 1992) ("Simplicity alone is not inimical to patentability."). The standard of obviousness is not whether in hindsight, it seems elementary that someone would have combined these certain elements in the prior art to form the invention in question. It is insufficient to prove that at the time of the claimed invention, the separate elements of the device were present in the known art. Rather, there must have been some explicit teaching or suggestion in the art to motivate one of even ordinary skill to combine such elements so as to create the same invention. See *Arkie Lures, Inc. v. Gene Larew Tackle, Inc.*, 119 F.3d 953, 957 [43 USPQ2d 1294] (Fed. Cir. 1997).

The prior art must provide one of ordinary skill in the art the motivation to make the proposed molecular modifications needed to arrive at the claimed compound. [at

1944] [emphasis added]

The Examiner has apparently utilized the claimed invention's simplicity in arriving at the §103(a) rejection of the claims under the guise of "permissible hindsight." *In re McLaughlin* held: "... the test for combining references is not what the individual references themselves suggest but rather what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art." *In re McLaughlin*, 170 USPQ at 212 (1971). The Court there further REVERSED the Board's decision as to Claim 15, basing the reversal on a Rule 1.132 affidavit submitted by the Applicant: "The evidence, comprising two affidavits and a series of exhibits, indicates that the invention has been commercially successful and that its concept was promptly adopted by a competitor. Recognizing that the inference of obviousness drawn from the prior art disclosures is only prima facie justification for drawing the ultimate legal conclusion that the claimed invention is unpatentable under 35 U.S.C. 103, it is imperative that such secondary considerations also be evaluated in determining the final validity of that legal conclusion. ... We emphasize that such is true even where, as here, the claimed invention involves only relatively simple mechanical concepts. 'A patentable invention, within the ambit of 35 U.S.C. 103, *may* result even if the inventor *has*, in effect, merely combined features, old in the art, for their own purpose, without producing anything beyond the results inherent in their use.'" *In re McLaughlin*, 170 USPQ at 212 (1971) [Emphasis added].

In the instant case, the Examiner has pointed to only individual features of the claimed invention in the individual references. However, the Examiner has not shown that the combination of the disclosures taken as a whole suggest the claimed invention. Even if the concept of color-coding, in general, has been known, the concept of solid color-coding has never been applied to substantially identical outlets of a plug strip apparatus until the present invention. The Examiner has yet to show that "a person of ordinary skill in the art," the relevant art would have thought to combine (1) a solid color-coding system with (2) substantially identical outlets on a plug strip apparatus. Another advantage of the present invention is that each substantially identical outlet could receive plugs which are substantially identical as well as if they were simply color-coded for association with a particular outlet.

The Applicant further respectfully requests that the Board of Appeals reconsider the Declaration of the Applicant Noel Lee, of record, which testifies to commercial success on the order of 458,010 units sold worth \$8,857,605.13 in wholesales in one year as well as to the nexus between this commercial success and the merits, i.e., color-coding the plug strip, the claimed features of the present invention, and the Declaration of Retailer Karen Johnson, which testifies to commercial success on the order of 31,657 units sold worth \$1,487,796.83 in retail sales in one year as well as to the nexus between this commercial success and the merits, i.e., the solid color-coding of the substantially identical outlets of the plug strip, of the claimed invention. Further, like as in the facts of *McLaughlin*, the concept was promptly adopted by the competitor Kensington (ACCO), i.e., Dwight, as demonstrated by the Declarations of the Applicant Noel Lee (para. 6 of both Declarations). Indeed, former Examiner Polk, in the November 5, 2001 second final Office Action (para. 4), concedes that the Declarations of Noel Lee and Karen Johnson “may be persuasive regarding commercial success and long felt need.” Furthermore, the evidence of record suggests that Kensington actually acquired the invention from a former employee of the present invention’s Assignee.

Furthermore, full weight should have been given to Expert Witness Dr. Mehrabian’s Rule 1.132 Declaration, which states that there is a “substantial advantage in using solid colors of high chroma” and which supports patentability in that “expected beneficial results are evidence of obviousness just as unexpected results are evidence of unobviousness.” *In re McLaughlin* also held that “[a] patentable invention, within the ambit of 35 U.S.C. 103, *may* result even if the inventor *has*, in effect, merely combined features, old in the art, for their own purpose, without producing anything beyond the results inherent in their use.” Therefore, even if the combination of the instant claimed elements only produced results “inherent in their use,” i.e., “expected beneficial results,” as is asserted by the Examiner, the Applicant respectfully submits that this circumstance would not and does not preclude patentability under *McLaughlin*.

Further, *In re Fritch*, 922 F.2d 1260, 23 USPQ.2d 1780 (Fed. Cir. 1992), held:

Mere fact that prior art may be modified to reflect features of claimed invention does not make modification, and hence claimed invention, obvious unless desirability of such modification is suggested by prior art [at 1780] [emphasis added]

The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. *In re Gordon*, 733 F.2d at 902, 221 USPQ at 1127. [at 1783] [emphasis added]

More recently, *Winner International Royalty Corp. v. Wang*, No. 96-2107, 48 USPQ2d 1139 (D.C.D.C. 1998) has reinforced the foregoing rule, that the motivating suggestion must be explicit, in holding:

... invention cannot be found obvious unless there was some explicit teaching or suggestion in art to motivate one of even ordinary skill to combine elements so as to create same invention. [at 1140] [emphasis added]

... there must have been some explicit teaching or suggestion in the art to motivate one of even ordinary skill to combine such elements so as to create the same invention. [at 1444] [emphasis added]

On November 2, 2000, a rejection of claims under 35 U.S.C. §103 was reversed by the U.S.P.T.O. Board of Patent Appeals and Interferences in *Ex Parte Yamamoto*, 57 USPQ2d 1382, 1384, on the ground that the examiner's mere conjecture and speculation (e.g., the Examiner's assertion of "common sense and common knowledge"), that one of ordinary skill in the art would have considered a prior art composition used for stabilizing higher aliphatic aldehyde compounds to also be useful for stabilizing the Applicant's claimed functional-group-containing compounds, are *insufficient for making an obviousness rejection*. Even more recently, *In re Zurko*, 59 USPQ2d 1697, 1698 (CAFC), decided on August 2, 2001, prior to the August 28, 2001, final Office Action, reversing the Board's decision, held:

Finally, the deficiencies of the cited references cannot be remedied by the Board's general conclusions about what is "basic knowledge" or "common sense" to one of ordinary skill in the art. ... the Board contended that "it is basic knowledge that communication in trusted environments is performed over trusted paths" and ... verifying the trusted command ... is "nothing more than good common sense." We cannot accept these findings by the Board. This assessment of basic knowledge and common sense was not based on any evidence in the record and, therefore, lacks substantial evidence support. Rather, the Board must point to some *concrete evidence* in the record in support of these findings.² To hold otherwise would render the process of appellate review for substantial evidence on the record a meaningless exercise. Accordingly, we cannot accept the Board's unsupported assessment of

the prior art. [Emphasis added.]

Thus, an examiner cannot simply reach conclusions based on his or her own understanding or experience nor on her assessment of what would be “basic knowledge” or “common sense.”

On point with respect to the nature of the rejections, is the case of *In re Gartside and Norton*, recently decided February 15, 2000, where the CAFC applied the well-established rules of *Dembiczak* (50 USPQ2d at 1616), *Graham* (148 USPQ at 467), *Pro-Mold* (37 USPQ2d 1626), and *Rouffet* (47 USPQ2d at 1456): “the ultimate determination ... whether an invention is or is not obvious is a legal conclusion based on underlying factual inquiries including (1) the scope and content of the prior art; (2) the level of ordinary skill in the prior art; (3) the differences between the claimed invention and the prior art; and (4) objective evidence of nonobviousness. ... the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is *rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references*. ... suggestion may come from ... the teachings of the references themselves, and ... from the nature of the problem to be solved.” Evidence of suggestion may be a “trend in the art” towards solving the problem by one of ordinary skill in the proposed manner.

More particularly, *Dembiczak*, in Section II of that opinion, states, “Measuring a claimed invention against the standard established by section 103 requires the oft-difficult but critical step of casting the mind back to the time of the invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom of the field. Close adherence to this methodology is especially important ... where the very ease with which the invention can be understood may prompt one ‘to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.’ ... ‘must specifically identify the reasons one of ordinary skill in the art would have been motivated to select the references and combine them’ ... ‘objective teaching [leading to the combination]’ ... conclusion of obviousness was error ‘when it did not elucidate any factual teachings, suggestions or incentives from this prior art that showed the propriety of combination’ Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor’s disclosure as a blueprint for piecing together the prior art to defeat patentability — the essence of hindsight.

... the showing [of actual evidence] must be clear and particular. ... 'examiner's [mere] conclusory statement ... unaccompanied by evidence or reasoning ... is entirely inadequate to support the rejection.'"

Even more specifically on point are *In re Piasecki* (223 USPQ 785, 787-788) and *In re Lulu* (223 USPQ 1257, 1258), restating *In re Fine* (5 USPQ2d at 1598), decided January 28, 1988, which states, "Fine says the PTO has not established a prima facie case of obviousness. ... the references applied by the . . . Examiner were improperly combined, using hindsight reconstruction, without evidence to support the combination He argues that ... the claims were rejected because the PTO thought it would have been 'obvious to try' the claimed invention, an unacceptable basis for rejection. We agree. The PTO has the burden ... to establish a prima facie case of obviousness. ... It can satisfy this burden only by a showing some objective teaching in the prior art or that the knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references."

2. Relevant case law applied to the evidence.

The present invention comprises a plurality of discrete, solid colored areas, each said discrete colored area being disposed on and surrounding each substantially identical outlet as demonstrated by independent Claims 49 and 58, respectively reciting:

49. An AC electrical power distribution system comprising:
 - a housing having a plurality of substantially identical AC power distribution outlets for connecting AC electrical power to a plurality of devices,
 - said housing having a plurality of colored areas for selectively identifying each outlet of said power distribution outlets,
 - each colored area of said colored areas on said housing being different in color from any other such colored area, and
 - each of said colored areas assigned to a different device.
58. A method for preventing confusion in users of a multiple outlet power strip having several identical outlets for providing power to a plurality of devices, comprising the steps of:

assigning a separate and distinct colored area proximate to each outlet for selectively identifying each outlet of said power strip;
assigning each colored area a different color from any other such colored area; and
providing colored indicia corresponding to the colors of said colored areas for identifying devices assigned to each colored area.

The law, under 35 U.S.C. § 103, is well settled that, for a cited art reference to render obvious a claimed invention, the combination of claimed elements must be taught, motivated, or suggested by the cited art. The limitations that patentably distinguish Claim 49 from Dwight (Wiener and Kensington), even in view of Barna, are as follows:

1. “a housing having a plurality of **substantially identical AC power distribution outlets** for connecting AC electrical power to a plurality of devices,”
2. “said housing having a plurality of **colored areas for selectively identifying each outlet** of said power distribution outlets,”
3. “**each colored area of said colored areas on said housing being different in color from any other such colored area, and**”
4. “**each of said colored areas assigned to a different device.**”

and, thus, by dependency, Claims 50-57 are also patentably distinct from Dwight, even in view of Barna.

The limitations that patentably distinguish Claim 58 from Dwight, even in view of Barna, are as follows:

1. “**assigning a separate and distinct colored area proximate to each outlet for selectively identifying each outlet** of said power strip,”
2. “**assigning each colored area a different color from any other such colored area; and**”
3. “**providing colored indicia corresponding to the colors of said colored areas for identifying devices assigned to each colored area.**”

and, thus, by dependency, Claims 59-62 are also patentably distinct from the Dwight, even in view of Barna.

The Dwight apparatus merely comprises thin colored rings disposed at a notable radius away from the outlets. Barna merely teaches the use of a hardwired pattern-colored template applied to a credit card terminal. Barna only serves to illustrate the problem with visual identification. The Barna template, being patterned and used with non-identical ports in the first instance, does not include the present human factors feature for facilitating identification of substantially identical outlets by solid color-coding. As such, Dwight, even in view of Barna, teaches away from the present invention.

In contrast to the cited art, the present invention comprises discrete solid colored areas which are disposed (a) on and (b) surrounding the outlets, i.e., proximally surrounding the outlets as shown in Figs. 1-3 of the present application, which permits better peripheral device connection identification when the plugs are obscured by power transformers than does Dwight, even in view of the Barna. Reiterating the relevant human factors considerations of record, the present invention solid colored areas appear more prominent to the human eye than do the cited art colored rings or pattern-colored templates. Thus, the Dwight colored rings do not provide the superior visual indicia of the instant invention.

In order to grasp this concept, the physiological concept of *visual acuity*, must be considered with respect to the claimed invention and as described elsewhere in the record, e.g., the June 26, 2001, Amendment Response to Office Action. The Applicant has utilized human factors engineering for the combined features of the present invention, i.e., the solid colored areas aspect, in order to optimize the information rate for the average consumer when using the present invention.

As discussed, *supra*, for a cited art reference to render obvious a claimed invention, the combination of claimed elements must be taught, motivated, or suggested by the cited art. Applying the foregoing rules against hindsight reconstruction to the instant case, the Examiner has inaccurately concluded that one of ordinary skill in the art would have done what the Applicant did to solve the problem. None of the several Examiners' evidence throughout this long and protracted examination, has shown any genuine teaching, motivation, nor suggestion in favor of combining these cited art references nor any of the previously cited references. The Examiner has engaged in impermissible hindsight reconstruction of the prior art.

The Examiner's reasoning in the outstanding Office Action uses the Applicant's claimed

invention as “a template for piecing together” bits from the cited references (p. 3, para. 2; p. 4, para. 2; p. 4, para. 9 - p. 5). The Examiner states that “Dwight discloses a power strip having ... colored areas,” but concedes that Dwight does not teach the colored areas are for selectively identifying each outlet. Moreover, Dwight’s colored elements are merely ornamental rather than functional colored rings. The Examiner pieces together the present invention by impermissibly combining Barna’s pattern-colored alignment strip (template) over non-identical ports with Dwight’s ornamental colored rings which, by virtue of being a design patent, teaches non-functional design ring elements. Neither reference nor the combination of these references teaches, suggests, nor motivates a utilitarian solid-color coding feature for substantially identical outlets as is claimed in the present invention.

If the Examiner’s reasoning is taken to its conclusion, no human factor invention would ever be patented. The Examiner has prejudiced the present invention’s simplifying advantages for the user under his 35 U.S.C. § 103(a) analysis by using Applicant’s teachings to piece together the cited references in the Office Action. The Examiner has based the rejection on impermissible hindsight reconstruction, as discussed, *supra*, in light of *McLaughlin*.

Dwight, having merely non-functional ornamental colored rings, even in view of Barna, having merely a pattern-colored alignment strip over non-identical ports, does not teach, motivate, nor suggest the present invention comprising functional solid color-coding of substantially identical outlets in a plug strip apparatus for providing faster, superior visual and mental recognition.

Whether Claims 50, 51, 54, and 55 are rejected under 35 U.S.C. § 103(a), over Dwight (US Des. 401,220), in view of Barna (US 5,775,935), and in further view of Liner (US 5,708,554).

A. Specific nature of the rejection.

Claims 50, 51, 54, and 55 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Dwight (US Des. 401,220), in view of Barna (US 5,775,935), and in further view of Liner (US 5,708,554).

B. Analysis in light of the evidence.

Both Dwight and Barna have been previously cited and subsequently withdrawn. The patentable distinctions between Dwight, in view of Barna, have been discussed, *supra*, for the Examiner’s convenience in light of the lengthy record. With respect to Liner, the Examiner relies

on this reference only for its teaching of an oversized outlet.

In contrast to Dwight, even in view of Barna, and even in further view of Liner, the present invention comprises a plurality of discrete, solid colored areas, each *discrete colored area* being disposed on and surrounding each substantially identical outlet. Thus, the present invention does not and cannot result from the hindsight reconstruction of the Kensington (Dwight) ornamental colored rings and the Barna pattern-colored template on non-identical ports in combination with the Liner oversized outlet, as demonstrated by dependent Claims 50, 51, 54, and 55, as follows:

- 50. An AC electrical power distribution system, as recited in claim 49, further comprising at least one other AC distribution outlet of greater size than each of said substantially identical AC power distribution outlets for connection to a bulky power adapter.
- 51. An AC electrical power distribution system, as recited in claim 50, further comprising a plurality of other AC distribution outlets of greater size than each of said substantially identical AC power distribution outlets for connection to bulky power adapters.
- 54. An AC electrical power distribution system, as recited in claim 49, further comprising a switch for powering on and off each and every one of said outlets.
- 55. An AC electrical power distribution system, as recited in claim 49, further comprising at least one indicator light.

The limitations that patentably distinguish Claim 50, including the limitations of base Claim 49, from Dwight, even in view of Barna, and even in further view of Liner, are as follows:

- 1. “a housing having a plurality of **substantially identical AC power distribution outlets** for connecting AC electrical power to a plurality of devices,”
- 2. “said housing having a plurality of **colored areas for selectively identifying each outlet** of said power distribution outlets,”
- 3. “**each colored area of said colored areas on said housing being different in color from any other such colored area, and**”
- 4. “**each of said colored areas assigned to a different device[,]**”

5. “at least one other AC distribution **outlet of greater size than each of said substantially identical AC power distribution outlets** for connection to a bulky power adapter.”

The limitations that patentably distinguish Claim 51, including the limitations of base Claim 49, from Dwight, even in view of Barna, and even in further view of Liner, are as follows:

1. “a housing having a plurality of **substantially identical AC power distribution outlets** for connecting AC electrical power to a plurality of devices,”
2. “said housing having a plurality of **colored areas for selectively identifying each outlet of said power distribution outlets,**”
3. “**each colored area of said colored areas on said housing being different in color from any other such colored area, and**”
4. “**each of said colored areas assigned to a different device[,]**”
5. “a plurality of **other AC distribution outlets of greater size than each of said substantially identical AC power distribution outlets** for connection to bulky power adapters.”

The limitations that patentably distinguish Claim 54, including the limitations of base Claim 49, from Dwight, even in view of Barna, and even in further view of Liner, are as follows:

1. “a housing having a plurality of **substantially identical AC power distribution outlets** for connecting AC electrical power to a plurality of devices,”
2. “said housing having a plurality of **colored areas for selectively identifying each outlet of said power distribution outlets,**”
3. “**each colored area of said colored areas on said housing being different in color from any other such colored area, and**”
4. “**each of said colored areas assigned to a different device[,]**”
5. “**a switch** for powering on and off each and every one of said outlets.”

The limitations that patentably distinguish Claim 55, including the limitations of base Claim 49, from Dwight, even in view of Barna, and even in further view of Liner, are as follows:

1. “a housing having a plurality of **substantially identical AC power distribution outlets** for connecting AC electrical power to a plurality of devices,”
2. “said housing having a plurality of **colored areas for selectively identifying each outlet of said power distribution outlets,**”

3. **“each colored area of said colored areas on said housing being different in color from any other such colored area, and”**
4. **“each of said colored areas assigned to a different device[,],”**
5. **“at least one indicator light.”**

The Dwight apparatus merely comprises thin colored rings disposed around the outlets. Barna merely teaches the use of a hardwired pattern colored template applied to a credit card terminal and only serves to illustrate the problem with visual identification. The Barna template, being patterned and used with non-identical ports in the first instance, does not include the present human factors feature for facilitating identification of substantially identical outlets by solid color-coding. Liner merely teaches an oversized outlet. Therefore, Dwight, even in view of Barna, even in further view of Liner, teaches away from the present invention.

Dwight, even in view of Barna, as discussed, *supra*, and even in further view of Liner, does not teach, motivate, nor suggest the present invention, but actually teaches away from the present invention's functional solid color-coding of substantially identical outlets as well as slightly oversized outlets in a plug strip apparatus.

Claim 53 is rejected under 35 U.S.C. §103(a), over Dwight (US Des. 401,220), in view of Barna (US 5,775,935), and in further view of Crane (US 5,899,761).

A. Specific nature of the rejection.

Claim 53 has been rejected under 35 U.S.C. §103(a) as being unpatentable over Dwight (US Des. 401,220), in view of Barna (US 5,775,935), and in further view of Crane (US 5,899,761). The Applicant hereby respectfully traverses the Examiner's grounds for rejection on this basis.

B. Analysis in light of the evidence.

Both Dwight and Barna have been previously cited and subsequently withdrawn, and discussed, *supra*, for the Examiner's convenience in light of the lengthy record. With respect to Crane, the Examiner relies on this reference only for its teaching of a coaxial plug.

In contrast to Dwight, even in view of Barna, and even in further view of Crane, the present invention comprises a plurality of discrete, solid colored areas, each discrete colored area being disposed on and surrounding each substantially identical outlet. The present invention does not and cannot result from the hindsight reconstruction of the Kensington (Dwight) ornamental colored rings

and the Barna pattern-colored template on non-identical ports in combination with the Crane coaxial plug, as demonstrated by dependent Claim 53, reciting:

53. An AC electrical power distribution system, as recited in claim 49, further comprising at least one coaxial cable jack.

The limitations that patentably distinguish Claim 53, including the limitations of base Claim 49, from Dwight, even in view of Barna, and even in further view of Crane, are as follows:

1. “a housing having a plurality of **substantially identical AC power distribution outlets** for connecting AC electrical power to a plurality of devices,”
2. “said housing having a plurality of **colored areas for selectively identifying each outlet** of said power distribution outlets,”
3. “**each colored area of said colored areas on said housing being different in color from any other such colored area, and**”
4. “**each of said colored areas assigned to a different device[,]**”
5. “**at least one coaxial cable jack.**”

The Dwight apparatus merely comprises ornamental thin colored rings disposed around the outlets. Barna merely teaches the use of a hardwired pattern-colored template over non-identical ports of a credit card terminal. Crane merely teaches coaxial plug. As such, Dwight, even in view of Barna, even in further view of Crane, does not teach, suggest, not motivate the present invention.

The addition of Crane to Dwight, in view of Barna, does not teach, motivate, nor suggest the present invention comprising functional solid color-coding of substantially identical outlets as well as slightly oversized outlets and at least one coaxial cable jack in a plug strip apparatus which provides faster superior visual and mental recognition.

Other issues for review on appeal

- A. **The present application should be treated as “special” by the examiner under MPEP § 707.02.**

1. **Rule under MPEP § 707.02: Applications Up for Third Action and 5-Year Applications [R2].**

MPEP § 707.02 addresses applications that are up for a third action and applications pending for five (5) years and provides:

The supervisory patent examiners should impress their assistants with the fact that the shortest path to the final disposition of an application is by finding the best references on the first search and carefully applying them.

The supervisory patent examiners are expected to personally check on the pendency of every application which is up for the third or subsequent office action with a view to finally concluding its prosecution.

Any application that has been pending five years should be carefully studied by the supervisory patent examiner and every effort should be made to terminate its prosecution. In order to accomplish this result, the application is to be considered "special" by the examiner.

2. Rule under MPEP § 707.02 as applied to the facts.

In the instant case, the present application has now been in examination for more than six (6) years and has received at least nine (9) office actions in the continuation case alone, excluding many office actions in the parent case. The priority document, a provisional patent application (US 60/070,217), was filed on January 2, 1998, and its corresponding non-provisional patent application (US 09/221,761) was filed within one year on December 28, 1998. Furthermore, the present application has been considered for appeal at least twice, as shown in the record, with prosecution being reopened by Examiner Polk following each Notice of Appeal, thereby resulting in a perpetual procedural loop to avoid allowance of the instant case.

Therefore, in light of the inordinate number of actions on the case, the inordinate number of appeals, the inordinate number of prosecution reopenings, and of the inordinate number of years in examination, the Applicant believes that the Examiner should treat the present application as "special" under MPEP § 707.02.

B. The rejection of previously allowed Claims 49-62 is improper under MPEP § 706.04.

1. Rule under MPEP § 706.04: Rejection of Previously Allowed Claims [R-1].

MPEP § 706.04 addresses the rejection of previously allowed claims and provides:

A claim noted as allowable shall thereafter be rejected only after the proposed rejection has been submitted to the primary examiner for consideration of all the facts and approval of the proposed action. Great care should be exercised in authorizing such a rejection. See *Ex parte Grier*, 1923 C.D. 27, 309 O.G. 223 (Comm'r Pat. 1923); *Ex parte Hay*, 1909 C.D. 18, 139 O.G. 197 (Comm'r Pat. 1909).

PREVIOUS ACTION BY DIFFERENT EXAMINER

Full faith and credit should be given to the search and action of a previous examiner unless there is a clear error in the previous action or knowledge of other prior art. In general, an examiner should not take an entirely new approach or attempt to reorient the point of view of a previous examiner, or make a new search in the mere hope of finding something. >*Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 126 F. Supp. 2d 69, 139, 57 USPQ2d 1449, 1499-50 (D. Mass. 2001).<

Because it is unusual to reject a previously allowed claim, the examiner should point out in his or her office action that the claim now being rejected was previously allowed by using Form Paragraph 7.50.

¶ 7.50 *Claims Previously Allowed, Now Rejected, New Art*

The indicated allowability of claim [1] is withdrawn in view of the newly discovered reference(s) to [2]. Rejection(s) based on the newly cited reference(s) follow.

Examiner Note:

1. In bracket 2, insert the name(s) of the newly discovered references.
2. Any action including this form paragraph requires the signature of a Primary Examiner.

2. Rule under MPEP § 707.02 as applied to the facts.

As discussed, supra, the Examiner has indicated that the pending claims are allowable during the October 21, 2004, Telephonic Interview. During the October 28, 2004, Telephonic Interview, the Examiner indicated that a Notice of Allowance would issue. On November 3, 2004, during another telephone conference with the Examiner, he indicated that the Supplemental Amendment required further revision only as to informalities which is also shown in the October 28, 2004, Notice of Non-Compliant Amendment. On November 12, 2004, a Revised Supplemental Amendment Response to Office Action was filed in compliance with the October 28, 2004, Notice of Non-Compliant Amendment. The USPTO online PAIR System status printout of January 24, 2005, indicated that a Notice of Allowability issued on November 15, 2004, but was never received by the Applicant's Attorney (See Evidence Appendix Exhibit A).

However, on January 25, 2005, i.e., one (1) day later, the electronic record of the November 15, 2004, Notice of Allowability was deleted from the USPTO PAIR System (See Evidence Appendix Exhibit B); and, instead, on January 31, 2005, the Applicant's Attorney received yet another Office Action dated January 25, 2004, wherein Claims 49-62 were rejected, citing a primary reference, Dwight (i.e., Kensington) (US Des. 401,220) and a secondary reference Barna (US 5,775,935), as grounds for rejection of the claims on the basis of 35 U.S.C. § 103(a), both of which were previously cited and withdrawn by Examiner Polk in the May 6, 2002, non-final Office Action,

nearly three (3) years ago.

MPEP § 706.04 states, “Great care should be exercised in authorizing such a rejection.” Particularly on point is that MPEP § 706.04 also provides: “Full faith and credit should be given to the search and action of a previous examiner unless there is a clear error in the previous action or knowledge of other prior art. In general, an examiner should not take an entirely new approach or attempt to reorient the point of view of a previous examiner, or make a new search in the mere hope of finding something.” The Applicant respectfully submits that the Examiner has not exercised the requisite level of care, i.e., “great care,” in rejecting the previously allowed claim in the outstanding Office Action.

Reiterating, a Telephonic Interview was conducted on February 9, 2005, for the purpose of pointing-out to Examiner DeBeradinis that both Dwight and Barna had already been previously cited and implicitly withdrawn by Examiner Polk, during which the Examiner concedes that he was unaware of that part in the file history. He further conceded that he had decided to conduct an independent search of the prior art, without even acknowledging the previously allowed claims, thereby resulting in Dwight and Barna being reasserted in the outstanding Office Action on his mistaken belief that these references were being newly cited, and thereby returning full circle to the examination conducted by Examiner Polk three (3) years ago. The Examiner stated that he felt uncomfortable with allowing any claims involving “color-coding” and that he was certain that he would find “something” with an independent search, i.e., the very motivation for conducting a fresh search that is prohibited by MPEP § 706.04.

In addition, the Examiner has not proffered any evidence of any clear error by Examiner Polk in implicitly withdrawing Dwight and Barna nor any evidence that the “other” prior art is “new.” Further, the Examiner has not complied with MPEP § 706.04 which requires that the Examiner point-out in his Office Action “that the claim now being rejected was previously allowed using Form Paragraph 7.50.” The Examiner has not acknowledged the previously allowed claims in the outstanding Office Action nor even explained how he has issued a Notice of Allowability (See Evidence Appendix Exhibit A) and then proceeded to withdraw it (See Evidence Appendix Exhibit B). The rejection of the previously allowed claims is improper under MPEP § 706.04.

C. The rejection of previously allowed Claims 49-62 is improper under MPEP §§ 2125 and 2126.

1. Rules under MPEP §§ 2125 and 2126: Drawings as Prior Art for § 103(a) rejection.

DRAWINGS CAN BE USED AS PRIOR ART

Drawings and pictures can anticipate claims if they clearly show the structure which is claimed. *In re Mraz*, 455 F.2d 1069, 173 USPQ 25 (CCPA 1972). However, the picture must show all the claimed structural features and how they are put together. *Jockmus v. Leviton*, 28 F.2d 812 (2d Cir. 1928). The origin of the drawing is immaterial. For instance, drawings in a design patent can anticipate or make obvious the claimed invention as can drawings in utility patents. When the reference is a utility patent, it does not matter that the feature shown is unintended or unexplained in the specification. The drawings must be evaluated for what they reasonably disclose and suggest to one of ordinary skill in the art. *In re Aslanian*, 590 F.2d 911, 200 USPQ 500 (CCPA 1979). See MPEP § 2121.04 for more information on prior art drawings as “enabled disclosures.”

I. AESTHETIC DESIGN CHANGES

In re Seid, 161 F.2d 229, 73 USPQ 431 (CCPA 1947) (Claim was directed to an advertising display device comprising a bottle and a hollow member in the shape of a human figure from the waist up which was adapted to fit over and cover the neck of the bottle, wherein the hollow member and the bottle together give the impression of a human body. Appellant argued that certain limitations in the upper part of the body, including the arrangement of the arms, were not taught by the prior art. The court found that matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed invention from the prior art.). [Emphasis added.]

2. Rule under MPEP § 707.02 as applied to the facts.

While MPEP § 2125 states that drawings in a design patent may be used as prior art to sustain a § 103(a) rejection, MPEP § 2126 circumscribes MPEP § 2125 by stating that “matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed invention from the prior art.” Applying the foregoing rules to the instant case, the Examiner has combined an ornamental feature of a design patent, i.e., the non-functional colored rings of Dwight, with a functional pattern-colored alignment strip over non-identical ports from Barna, to piece-together the claimed invention. *In re Seid* held that an ornamental limitation does not patentably distinguish a given combination of claimed elements over

prior art which teaches that combination of claimed elements. Clearly, combining an ornamental feature from one reference with a functional feature of another reference cannot sustain a §103(a) rejection against a given claimed functional feature, because the requisite explicit motivation to combine is absent. Moreover, to hold otherwise would fly in the face of the prohibition against impermissible hindsight reconstruction.

Further, *In re Harvey*, 29 USPQ2d 1206, 1209, decided December 7, 1993, held that a “post-hoc rationalization of the claimed design ... is improper[,]” reasoning that “like the examiner, the Board improperly mixed the principles of obviousness for utility patents with those for ornamental design patents Therefore, in considering prior art references for purposes of determining patentability of ornamental designs, the focus must be on appearances and not uses. *In re Glavas*, 230 F.2d 446, 450, 109 USPQ 50, 52 (CCPA 1956).” Conversely, in considering prior art references for purposes of determining patentability of utility claims, the focus must be on uses and not on appearances. The Examiner has improperly combined purely ornamental, non-functional features of the Dwight design with non-analogous, functional features from Barna, to reconstruct the presently claimed invention in hindsight.

VIII. CONCLUSION

Accordingly, Claims 49-62, as submitted on November 12, 2004, better encompass the full scope and breadth of the present invention, notwithstanding the Applicant's belief that the claims would have been allowable as originally filed. The Applicant respectfully reasserts that no claims have been narrowed within the meaning of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* (Fed.Cir. November 29, 2000). Therefore, reversal of the Final Office Action and allowance of the present application in light of the this brief is respectfully requested. Pending Claims 49-62 are believed to be fully supported by the specification, and are believed to be in allowable form. Favorable action is accordingly solicited.

Respectfully submitted,



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Reg. No. 27,207

FDL/taa
March 9, 2006
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CLAIMS APPENDIX

Claims:

- 5 49. An AC electrical power distribution system comprising:
a housing having a plurality of substantially identical AC power distribution outlets for
connecting AC electrical power to a plurality of devices,
said housing having a plurality of colored areas for selectively identifying each outlet of
said power distribution outlets,
each colored area of said colored areas on said housing being different in color from any
other such colored area, and
each of said colored areas assigned to a different device.
50. An AC electrical power distribution system, as recited in claim 49, further comprising at
least one other AC distribution outlet of greater size than each of said substantially
identical AC power distribution outlets for connection to a bulky power adapter.
51. An AC electrical power distribution system, as recited in claim 50, further comprising a
plurality of other AC distribution outlets of greater size than each of said substantially
identical AC power distribution outlets for connection to bulky power adapters.
52. An AC electrical power distribution system, as recited in claim 49, further comprising at
least one telephone jack.
53. An AC electrical power distribution system, as recited in claim 49, further comprising at
least one coaxial cable jack.
54. An AC electrical power distribution system, as recited in claim 49, further comprising a
switch for powering on and off each and every one of said outlets.

55. An AC electrical power distribution system, as recited in claim 49, further comprising at least one indicator light.
56. An AC electrical power distribution system, as recited in claim 49, further comprising labels having colors corresponding to the colors of said colored areas, said labels for identifying different devices.
57. An AC electrical power distribution system as recited in claim 49, further comprising a set of colored cords having colors corresponding to the colors of said colored areas.
58. A method for preventing confusion in users of a multiple outlet power strip having several identical outlets for providing power to a plurality of devices, comprising the steps of:
5 assigning a separate and distinct colored area proximate to each outlet for selectively identifying each outlet of said power strip,
assigning each colored area a different color from any other such colored area; and
providing colored indicia corresponding to the colors of said colored areas for identifying devices assigned to each colored area.
59. A method, as recited in claim 58, wherein said indicia are colored labels having the same colors as the colored area proximate to each outlet.
60. A method, as recited in claim 58, wherein said are colored cords having the same colors as the colored area proximate to each outlet.
61. A method, as recited in claim 58, wherein said indicia are colored plugs having the same colors as the colored area proximate to each outlet.

62. A method, as recited in claim 58, wherein said indicia are colored stickers having the same colors as the colored area proximate to each outlet wrapped around the cord.

EVIDENCE APPENDIX:

EXHIBIT A

USPTO PAIR SYSTEM CASE STATUS PRINTOUT (January 24, 2005)

EXHIBIT B

USPTO PAIR SYSTEM CASE STATUS PRINTOUT (January 25, 2005)

EXHIBIT C

EVIDENCE OF RELATED ENTITY FOR PRIMARY CITED REFERENCE

1. [Http://tile.net/vendors/index.php?v_id=1235](http://tile.net/vendors/index.php?v_id=1235) (web page containing information as to parent/subsidiary relationship of the Dwight reference).

COMPARATIVE DRAWINGS

1. Present Invention (3 pages)
2. Dwight (4 page)
3. Barna (2 page)
4. Prior Art Plain Plug Strip Problems
5. Present Invention Solid Color Coded Plug Strip Solutions



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09/735,697

Apparatus and method for powering multiple peripheral devices color-coded central power source

Application Data	Transaction History	Image File Wrapper	Continuity Data	Published Documents	Publication Dates	Address & Attorney/Agent
Date	Contents Description					
11-15-2004	Notice of Allowability					
11-15-2004	Date Forwarded to Examiner					
11-12-2004	Response after Non-Final Action					
11-15-2004	Correspondence Address Change					
10-28-2004	Mail Notice of Informal or Non-Responsive Amendr					
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09-22-2004	Supplemental Response					
09-22-2004	Workflow incoming amendment IFW					
07-13-2004	Case Docketed to Examiner in GAU					
05-15-2004	IFW TSS Processing by Tech Center Complete					
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12-11-2001	Notice of Appeal Filed					
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02-08-2002	Appeal Brief Filed
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11-02-2001	Final Rejection
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03-09-2001	Case Docketed to Examiner in GAU
03-01-2001	Application Dispatched from OIPE
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09/735,697 Apparatus and method for powering multiple peripheral devices from color-coded central power source

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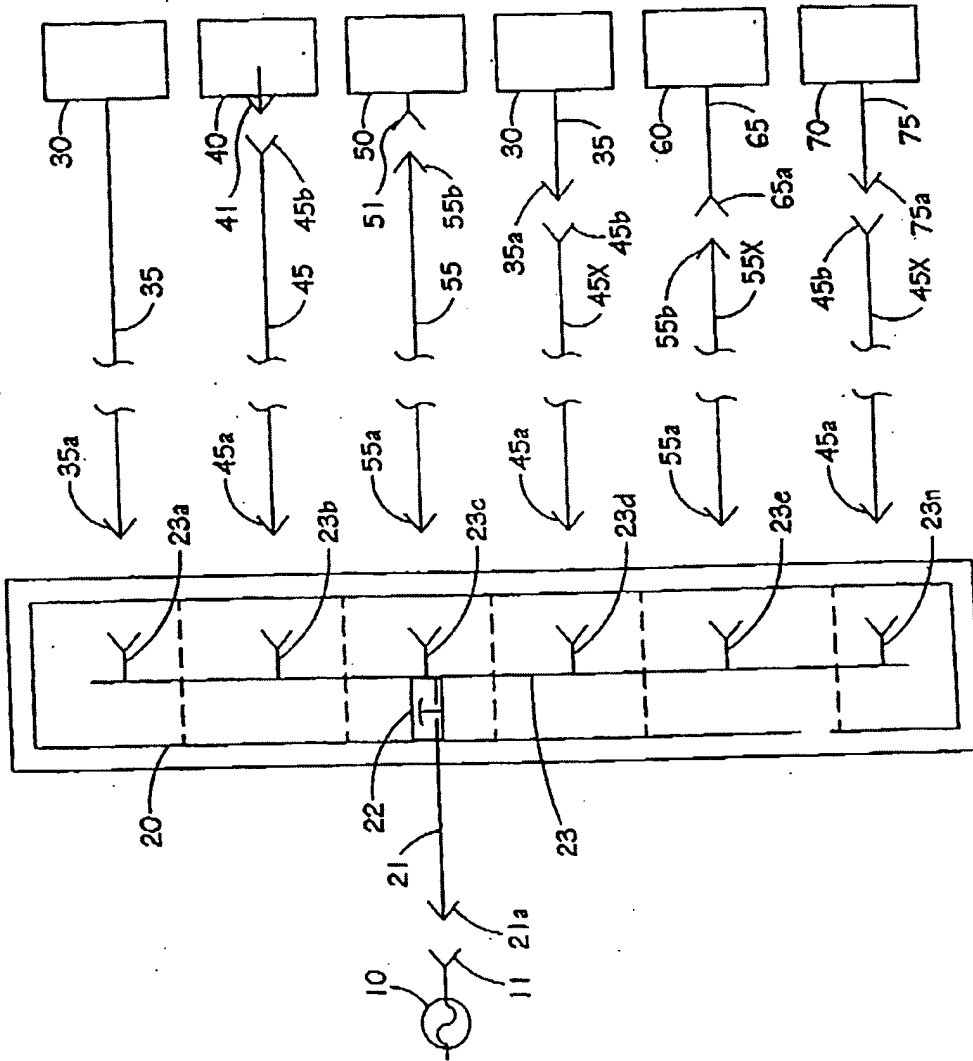
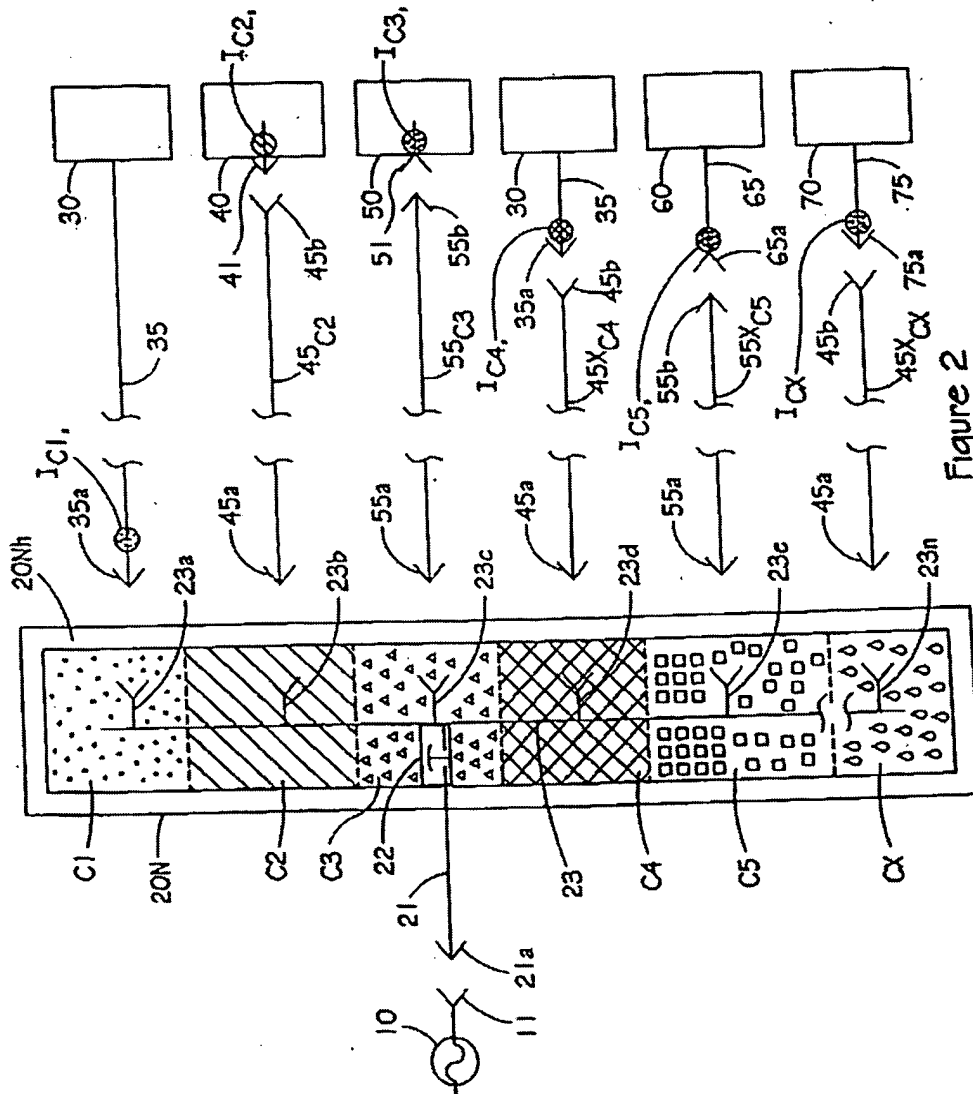


Figure 1
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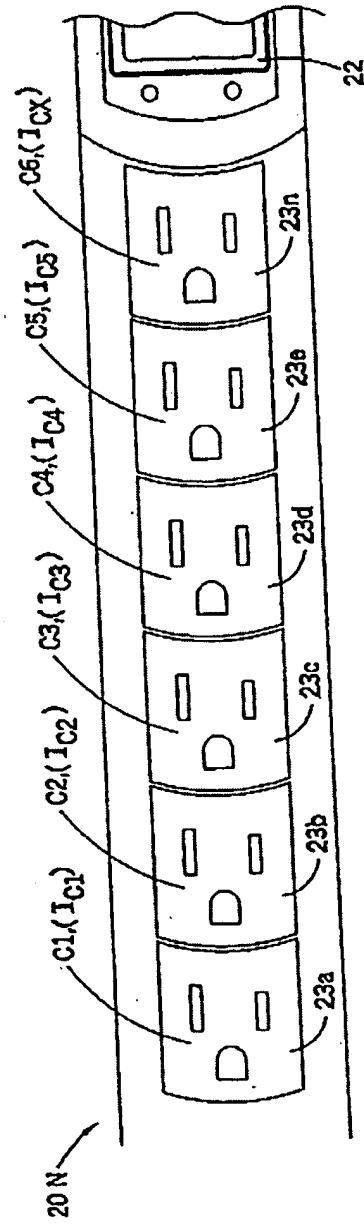


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